

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KRISTENA L.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, H.S., AND H.C.,
Appellees.

No. 2 CA-JV 2018-0097
Filed November 9, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pinal County
No. S1100JD201600192
The Honorable DeLana J. Fuller, Judge Pro Tempore

AFFIRMED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

KRISTENA L. v. DEP'T OF CHILD SAFETY
Decision of the Court

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

E P P I C H, Judge:

¶1 Kristena L. appeals from the juvenile court's order terminating her parental rights to her daughter, H.S., born in November 2008, on the grounds she had been in court-ordered care for longer than nine and fifteen months and chronic substance abuse.¹ See A.R.S. § 8-533(B)(3), (8)(a), (c). On appeal, Kristena challenges only the court's finding that termination was in H.S.'s best interests. We affirm.

¶2 We view the facts in the light most favorable to sustaining the juvenile court's ruling. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 2 (2016). In September 2016, the Department of Child Safety (DCS) placed H.S. with her maternal grandparents and filed a dependency petition as to the parents. H.S. was found dependent in October 2016. In December 2017, the juvenile court changed the case plan to severance and adoption as to Kristena and directed DCS to file a motion to terminate her parental rights. In its motion, DCS alleged as grounds for termination nine and fifteen months' time in care and chronic substance abuse. See A.R.S. § 8-533(B)(3), (8)(a), (c). In January 2018, the court granted the father's motion to place H.S. with him in Oregon. After a one-day severance hearing in April 2018, at which the only contested issue was whether termination was in H.S.'s best interests, the court granted DCS's motion on all of the grounds asserted and found that termination was in H.S.'s best interests.² This appeal, in which Kristena challenges only the court's best interests finding regarding H.S., followed.

¶3 At the conclusion of the severance hearing, the juvenile court noted that H.S. had been placed with her father and reaffirmed that she

¹Although the juvenile court also severed Kristena's parental rights to H.S.'s half-brother, she does not challenge that portion of the ruling.

²Although Kristena only challenged the best interests allegation regarding H.S. and consented to severance regarding H.S.'s half-brother, the juvenile court conducted a severance trial as to both children.

KRISTENA L. v. DEP'T OF CHILD SAFETY
Decision of the Court

"needs to have the opportunity to have permanency," which it determined would not be possible without severing Kristena's parental rights.³ The court explained:

[T]his Court does not believe that permanency would be long-lasting if I did not sever mother's rights as to [H.S.]. There is [an] ongoing, highly-contested relationship between the mother and the father. This child needs to be free from ongoing constant litigation that . . . would be ongoing if I did not terminate the parental rights of mother and the child I do find that it's in the best interest of the minor child, [H.S.], that mother's rights be terminated as to her.

. . . .

I only hope that after these proceedings are over that the relationship between the father of [H.S.] and the maternal family somehow works out, because this child needs to be in the life of, not only the maternal grandparents [and] maternal family and have a relationship with mother, but that relationship needs to be ongoing and the family needs to respect the rights of the father.

³In contrast to its oral ruling, in its written ruling the juvenile court erroneously stated, as to H.S., who was living with her father, that termination would "further the plan of adoption," that "[t]he children are residing in an adoptive placement," and that failing to sever would "delay permanency, leaving the children to linger in care for an indeterminate period since the children [do] not have parents who are able to care for them." The court also erroneously appointed DCS as H.S.'s legal guardian, in contrast to the clear language in its oral ruling that she had been placed with her biological father. Additionally, in its oral ruling, the court adopted the best-interests allegations set forth in DCS's motion for termination, which stated that H.S. was in an adoptive placement, a fact that was no longer true when the severance hearing took place. Kristena does not challenge these errors on appeal.

KRISTENA L. v. DEP'T OF CHILD SAFETY
Decision of the Court

¶4 A juvenile court may terminate a parent's rights if it finds clear and convincing evidence of a statutory ground for severance and finds by a preponderance of the evidence that termination is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). "[W]e will affirm a termination order that is supported by reasonable evidence." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18 (App. 2009). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. See *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10 (App. 2009).

¶5 To establish that termination is in a child's best interests, a petitioner must show how the child would benefit from termination or be harmed by continuing the parent-child relationship. *In re Maricopa Cty. Juv. Action No. JS-5000274*, 167 Ariz. 1, 5 (1990). "In a best interests inquiry, however, we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence." *Kent K.*, 210 Ariz. 279, ¶ 35. "Once a juvenile court finds that a parent is unfit, the focus shifts to the child's interests." *Demetrius L.*, 239 Ariz. 1, ¶ 15. "Thus, in considering best interests, the court must balance the unfit parent's 'diluted' interest 'against the independent and often adverse interests of the child in a safe and stable home life.'" *Id.* (quoting *Kent K.*, 210 Ariz. 279, ¶ 35).

¶6 On appeal, Kristena argues the juvenile court's reliance on the risk of ongoing or future custody litigation between the parents is not supported by the record and is not, in any event, an appropriate factor for the court to have considered in its best-interests finding. While acknowledging that her relationship with the father had been "very poor," Kristena nonetheless asserts "there was no evidence that . . . [she and the father] had a bad relationship at the time of the severance." And, conceding that DCS had presented evidence that the maternal grandmother had "obstructed" the father's access to H.S. during the pendency of the case, Kristena apparently attempts to challenge the basis for the court's best-interests ruling by maintaining that "no rational trier of fact would grant the grandmother custody of H.S. or even unsupervised visits with her." Additionally, although Kristena acknowledges that H.S. cannot be placed with her, she nonetheless argues severance "will not afford H.S. stability and permanence." She also maintains "[t]he suggestion that [she] will achieve sobriety in the future and then seek a change in custody is speculative and not a basis for finding that severance is in H.S.'s best interests." She additionally asserts there is "no risk of [H.S.] being exposed

KRISTENA L. v. DEP'T OF CHILD SAFETY
Decision of the Court

to further litigation,” suggesting a custody dispute is unlikely to occur because the father lives “a thousand miles away from Arizona.”

¶7 However, at the severance hearing, DCS case manager Aimee Rogers testified that termination was in H.S.’s best interests because “[i]t would allow her to have permanency and stability and remain in a safe and secure environment that is also free from substance abuse.” See *Alma S. v. Dep’t of Child Safety*, 245 Ariz. 146, ¶ 12 (2018) (“The ‘child’s interest in stability and security’ must be the court’s primary concern.” (quoting *Demetrius L.*, 239 Ariz. 1, ¶ 15)). Rogers added that failing to terminate Kristena’s rights would place H.S. at risk of exposure to such abuse during visits with Kristena.⁴ She also testified that, although the father was willing to allow H.S. to maintain contact with the grandmother and Kristena, severing the mother’s rights would permit him to control H.S.’s visits with Kristena, who had been “unable to demonstrate sobriety.”

¶8 When asked if DCS usually dismisses a dependency when a child is placed with the other parent, Rogers responded that it makes such decisions on a case-by-case basis. Notably, she explained that this case is distinguished by Kristena’s “ongoing substance abuse and the fact that it’s been 18 months of minimal engagement and attempts to . . . cheat on UAs,” which Rogers viewed as a risk to H.S.’s future safety. Cf. *In re Maricopa Cty. No. JS-501568*, 177 Ariz. 571, 577 (App. 1994) (“Leaving the window of opportunity for remediation open indefinitely is not necessary, nor do we think that it is in the child’s or the parent’s best interests.”). In addition, based on the poor relationship between the maternal family and the father, a finding the record supports, Rogers opined that ongoing custody battles between the parents will “never be over.” Moreover, despite Kristena’s claim that there was no evidence she had a bad relationship with the father and that there was no risk of future litigation between them, Kristena herself testified that she and the father had experienced difficulties and acknowledged she was “opposed” to H.S. being placed with the father, rather than her family.

¶9 It was for the juvenile court, not this court, to determine how much weight to give the evidence and to assess it under the proper standard, including whether the risk of future litigation and the potential stress associated with that possibility should be a factor in the court’s best-interests determination. See *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz.

⁴ Both H.S.’s attorney and the guardian ad litem agreed that termination was in H.S.’s best interests.

KRISTENA L. v. DEP'T OF CHILD SAFETY
Decision of the Court

278, ¶ 4 (App. 2002). To the extent Kristena asks this court to reweigh the evidence, we will not do so. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 14 (App. 2004). Based on this record, and “applying our deferential standard of review,” *Alma S.*, 245 Ariz. 146, ¶ 21, there was ample evidence to support the court’s finding that severance would enhance H.S.’s stability, particularly by removing the risk of future litigation and ensuring the father had complete control over Kristena’s access to H.S. This is particularly evident in light of the maternal family’s expressed desire to have H.S. live with the maternal grandmother and Kristena’s inability to overcome her drug issues. *See id.* ¶¶ 1, 15 (in making a best-interests determination in severance matter, juvenile court must consider totality of circumstances at time of severance, including parent’s rehabilitation).

¶10 Kristena also argues that severance is contrary to the best-interests finding in light of H.S.’s desire to live with her. However, by noting the importance of permitting H.S. to maintain a relationship with Kristena and the maternal family, the juvenile court did, albeit inferentially, acknowledge H.S.’s wishes. Moreover, as we previously stated, this court does not reweigh the evidence on appeal. *See Oscar O.*, 209 Ariz. 332, ¶ 14. Finally, to the extent Kristena argues in her reply brief that because H.S. now lives with the father, the maternal grandmother no longer has the ability to interfere with the father’s access to H.S., her argument misses the point of the juvenile court’s concern about potential future custody litigation.

¶11 Accordingly, we affirm the juvenile court’s severance of Kristena’s parental rights to H.S.